UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HOLLY LLOYD, *Plaintiff,* *vs.* COVANTA PLYMOUTH RENEWABLE ENERGY, LLC, *Defendant.*	**No. 2:20-cv-4330-HB** [Electronically filed] JUDGE HARVEY BARTLE III **ORAL ARGUMENT REQUESTED**

DEFENDANT'S REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS AND STRIKE

FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR LLC
Robert M. Donchez ID No: 209505
Robert Freedberg, ID No: 7855
60 West Broad Street, Suite 102
Bethlehem, PA 18018
(610) 691-7900
rdonchez@floriolaw.com
rfreedberg@floriolaw.com

BEVERIDGE & DIAMOND, P.C.
Michael G. Murphy (*admitted pro hac vice*)
477 Madison Avenue, 15th Floor
New York, New York 10022
(212) 702-5400
mmurphy@bdlaw.com

James B. Slaughter (*admitted pro hac vice*)
1350 I Street, N.W., Suite 700
Washington, DC 20005
(202) 789-6000
jslaughter@bdlaw.com

Collin Gannon (*admitted pro hac vice*)
201 North Charles Street, Ste 2210
Baltimore, MD 21201-4150
(410) 230-1300
cgannon@bdlaw.com

Attorneys for Defendant Covanta Plymouth Renewable Energy, LLC

November 30, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL COURT CASES

STATE COURT CASES

STATUTORY AUTHORITIES

FEDERAL RULES AND REGULATIONS

ADDITIONAL AUTHORITIES

INTRODUCTION

The gravamen of Plaintiff's Complaint is nuisance, and this action should proceed solely on nuisance claims. Plaintiff Lloyd's opposition to the partial motion to dismiss cannot overcome the clear requirement of physical damage for negligence and the controlling authority of *Gilbert* that duty does not lie for offsite odors from a regulated facility. Pennsylvania negligence law does not encompass a redundant tort claim on behalf of thousands of households spanning a significant portion of southeastern Pennsylvania absent any allegation of discernable physical harm, and no authority holds otherwise. Plaintiff has over-reached, and Covanta Plymouth's partial motion to dismiss must be granted.

As the Complaint acknowledges, Defendant Covanta Plymouth is a heavily regulated and permitted operation that for decades has served essential waste management and renewable energy needs of thousands of individuals, local governments, and businesses, with minimal offsite odors. Plaintiff dismissively characterizes Covanta Plymouth's motion as meritless because she cannot refute that the Complaint's allegations are conclusory and deficient to state a claim for negligence, or set forth the prerequisite facts that would entitle her to injunctive and punitive relief.

First, Plaintiff's claim for negligence arises from the same underlying allegations as her nuisance claim, and this is fatal under Pennsylvania law and the holdings of the Superior Court in *Gilbert* and *Horne*. Pennsylvania courts have long held that negligence is distinct from nuisance, and that there is no duty to prevent nuisances that result in no physical harm. Ms. Lloyd fails to offer any counter to this plain principle. Plaintiff has not alleged cognizable physical harm, and she concedes (by not contesting) that her conclusory references to "property damage" fail to state a Pennsylvania negligence claim in accordance with the applicable duty.

Second, Plaintiff offers no substantive defense of her demand for punitive damages. Instead, she argues that it is premature to consider its viability, thereby failing to rebut Pennsylvania precedent dismissing demands for punitive damages on the pleadings where the allegations fall well short of establishing the requisite outrageous and malicious conduct.

Finally, Plaintiff fails to substantiate her request for unspecified injunctive relief. In fact, Plaintiff fails to even contest Covanta Plymouth's primary jurisdiction argument, and instead asserts that conflict preemption should not apply. Covanta Plymouth did not invoke conflict preemption. Plaintiff is asking this Court to direct the manner in which Covanta Plymouth must operate its waste-to-energy facility, but Covanta Plymouth's operations – as Plaintiff and her Complaint admit – are already subject to comprehensive regulation and oversight by the Pennsylvania Department of Environmental Protection ("PADEP"). PADEP has primary regulatory authority over waste-to-energy facilities, applying its reasoned expertise regarding permitting and enforcement to ensure compliance. Injunctive relief would subject Covanta Plymouth to conflicting mandates inhibiting PADEP's principal regulatory authority.

ARGUMENT

I. The Opposition Cannot Overcome the Requirement of Physical Damages and Precedent Declining a Duty for Intermittent Odors

Pennsylvania law imposes no legal duty, as a matter of negligence law, to prevent offsite nuisance conditions absent physical harm. Plaintiff's negligence claim is a repackaged nuisance claim, and as such, Pennsylvania law disallows it as an independent claim.

A. *Baptiste* decided none of the issues presented by Covanta Plymouth's Motion.

Desperate to avoid engaging Pennsylvania law on the merits, the centerpiece of Ms. Lloyd's brief is misrepresentation of the posture and holding of the Third Circuit's *Baptiste* decision, peppered with attacks on opposing counsel. The *Baptiste* panel reversed and remanded

the District Court's dismissal of the *Baptiste* plaintiffs' entire putative class action odor complaint premised in nuisance and negligence. *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214 (3d Cir. 2020). In its opinion reinstating the *Baptiste* plaintiffs' nuisance claims, the Third Circuit specifically reserved ruling on whether the mere odor nuisance conditions alleged in the complaint could yield the requisite physical harm needed to state a claim for negligence. *Id.* at 229. Contrary to Plaintiff's misrepresentation that the *Baptiste* defendant precipitated this ruling, the court actually wrote that the plaintiffs had "refined their position [at the hearing before the District Court]," forcing the defendant to "modify its argument accordingly" on appeal. *Id.* at 227-28. The panel's remand of the question of adequacy of the negligence claim was not some "loophole"; it was a recognition that there was merit to the *Baptiste* defendant's contention that the plaintiffs had failed to allege the requisite cognizable physical harm in support of their negligence claim. *See id.* ("Still, the question remains whether the Baptistes have sufficiently pleaded a cognizable injury to state an independent negligence claim. The Baptistes believe they have sufficiently pleaded physical property damages." (emphasis added, citation omitted)).

The Third Circuit thus never questioned the requirement for physical injury to state a negligence claim in that context, and instead left it to the "District Court to determine whether to consider the question of physical injury on remand either before or at the summary judgment stage." *Id.* (emphasis added). In fact, the Third Circuit signaled that its commentary on the parties' negligence dispute was merely dicta, stating that it would "not venture into the weeds of [the negligence issues] in the first instance." *Id.* at 229 ("Our Circuit adheres to a well established principle that it is inappropriate for an appellate court to consider a contention raised on appeal that was not initially presented to the district court." (citation omitted)).

Upon receipt of the Third Circuit's mandate in the *Baptiste* plaintiffs' favor – on August 4, 2020, more than two years after the *Baptiste* plaintiffs had filed their complaint – the District Judge simply ordered the *Baptiste* defendant "file an answer to the Complaint." ECF 40, No. 18-cv-2691 (E.D. Pa., August 27, 2020). The *Baptiste* defendant filed a partial answer and partial motion to dismiss, which the District Judge summarily denied without any opposition, commentary or memorandum opinion, *see* ECF 48, No. 18-cv-2691 (E.D. Pa., Sept. 15, 2020). It is impossible to know the basis for the District Court's decision, and it cannot provide any guidance here. *See, e.g.*, *Spinner Corp. v. Princeville Dev. Corp.*, 849 F.2d 388, 390 (9th Cir. 1988) ("Without a written opinion explaining the decision, however, [the decision] has little or no precedential value for this court."). While Plaintiff wrongly and brazenly labels Judge Kenney's decision an "unequivocal rejection of [Defendant's] argument," and impugns Covanta Plymouth's motion here as a "baseless" "attorney-driven effort" that "this Court will see through," Covanta Plymouth is confident this Court will focus on the merits of the established Pennsylvania law that disallows Plaintiff's negligence claim.

B. Plaintiff fails to distinguish *Gilbert*'s holding that there is no duty in negligence for transient nuisances.

Plaintiff advances a strawman that Covanta Plymouth disavows any duty in negligence for its facility. To the contrary, on Plaintiff's complaint Defendant does not have a duty, because there are only nuisance damages and no physical injury. Covanta Plymouth has explained how a duty prescribed by law in this context must be anchored in clear parameters and physical damages, because Pennsylvania only recognizes a duty to prevent alleged nuisance conditions that cause cognizable physical harm. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 798 (3d Cir. 1994) (allowing recovery for stigma damages only "where [ ] defendants have caused . . . physical damage to plaintiffs' property") (emphasis added); *see also Menkes v. 3M Co.*, 2018

WL 2298620, at *7 (E.D. Pa. May 21, 2018) (Tucker, J.) ("In Pennsylvania, property damages require physical damage to property."). As this Court explained in its 2016 decision in *Vizant Technologies*, Pennsylvania law bars "claims arising from negligence that result[] solely in economic damages unaccompanied by physical or property damage." *Vizant Techs., LLC v. Whitchurch*, 2016 WL 97923, at *16 (E.D. Pa. Jan. 8, 2016) (Bartle, J.), *aff'd*, 675 F. App'x 201 (3d Cir. 2017), *as amended* (Feb. 2, 2017) (internal quotations omitted). Duty is an essential element of negligence; Pennsylvania courts alone establish whether there is a duty, and then define that duty's permissible parameters. *See Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 221 (Pa. 2018).

Due to Plaintiff's misconstruction of Covanta Plymouth's argument, her opposition first seeks to convince the Court of the obvious – that Covanta Plymouth does owe some duty to undertake its operations with reasonable care. Plaintiff then leaps to the contention that the duty is the prevention of all "harm," and never addresses the many Pennsylvania cases that have circumscribed negligence duties between lawful pursuits and their neighbors. *See* Opp. at 10-15.

Plaintiff rests on an open-ended, borderless duty because she is confronted with the on-point controlling Pennsylvania authority in the *Gilbert* case defining the duty on these facts: There is no legal duty under Pennsylvania law "that requires a property owner to use his or her property in such a manner that it protects neighboring landowners from offensive odors or other nuisance conditions." *Gilbert v. Synagro Central*, 90 A.3d 37, 51 (Pa. Super. 2014), *aff'd in part and rev'd in part*, 131 A.3d 1, 23 (Pa. 2015). The Pennsylvania Supreme Court affirmed this holding. *Gilbert v. Synagro Cent., LLC*, 131 A.3d 1, 23 (Pa. 2015) (affirming without discussion all aspects of the Superior Court order not directly addressed, including the negligence holding).

Gilbert – an odor-driven nuisance case more similar than not to the facts alleged here – sets forth the rule of this case; Plaintiff's efforts to sidestep this plain statement of law are unavailing. Plaintiff tells the Court that "*Gilbert* does not stand for the proposition that the spread of emissions of odor or particulate can never be violative of a legal duty." Opp. at 12. That is not Covanta Plymouth's argument. *Gilbert* simply explains the scope of the legal duty applicable to permitted operations that allegedly cause nuisance conditions, like odors. Plaintiff incorrectly argues that *Gilbert*'s negligence ruling hinged on the applicability of Pennsylvania's Right to Farm Act. Opp. at 13. In fact, the Right to Farm Act ruling on the Act's statute of repose for nuisance claims is completely distinct from the unambiguous, broad negligence holding in *Gilbert*. *See* 90 A.3d at 51. Plaintiff cannot avoid *Gilbert*'s clear application of Pennsylvania's well-established landowner duty of care and requirement of physical damage.

In seeking to impermissibly impose a duty based solely on foreseeability, Ms. Lloyd claims such a "duty has been found in the context of power plants, brass smelters, natural gas extraction, road construction, and more." Opp. at 11. Plaintiff misreads these cases and Pennsylvania's tailoring of duty to physical damage, not transient odors from lawful operations. Plaintiff's cases in truth underscore the principle that negligence will not lie in for mere allegations of nuisance conditions absent physical damage, because the case law she cites all involve cognizable physical damage.[1]

[1] *See Waschak v. Moffat*, 109 A.2d 310, 317-18 (Pa. 1954) (negligence claim and duty found where emissions from adjacent coal mining operations caused discoloration and damage to paint on home sidings); *Dussell v. Kaufman Const. Co.*, 157 A.2d 740, 741 (Pa. 1960) (negligence claim and duty found where construction pile-driving caused considerable physical property damage to the foundations of nearby homes, resulting in subsidence, as a result of the subterranean boring); *Noerr v. Lewistown Smelting & Ref., Inc.*, 1973 WL 16571, (C.P. 1973) (negligence claim and duty applied where smelter emissions contained odorous lead components and evidence included dead livestock and showed "damages to paint on the buildings, lead poisoning to domestic animals from the fallout, illness, irritation and discomfort to residents

Tellingly, Plaintiff also fails to rebut the Restatement's teaching that a possessor of land is subject to "liability for physical harm to others outside the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm." Restatement (Second) of Torts, § 371 (1965) (emphasis added); 1 *Toxic Torts Guide* § 3.02 (2020) ("[C]onduct is not actionable in negligence . . . unless it results in damage to persons or property. . . . [And] a plaintiff cannot recover for economic injuries . . . unless non-economic harm also occurs."). The duty that Covanta Plymouth owes is to prevent physical harm to persons or property, and not a duty to prevent intangible nuisance impacts, like odor.

Plaintiff next attempts to sidestep this unfavorable maxim with an unsupported argument that "lost property value" allegations can suffice for the essential element of physical damage to state a negligence claim. *See* Opp. at 17-20. But property value claims are only available under Pennsylvania law where there has been permanent (physical) property damage. *See Lobozzo v. Adam Eidemiller, Inc*., 263 A.2d 432, 437 (Pa. 1970). In *Lobozzo,* the Pennsylvania Supreme Court disclaimed recovery for property value diminution, by explaining that where physical damage to property is remediable, the measure of damages is the cost of repair, unless that cost would exceed the value of the property. *Id.* (involving temporary physical structural damage). Here, Plaintiff has not alleged permanent damage, nor has she pled repair costs. Instead, she cites

---

generally of the area to and "damages to their farmlands, crops, domestic animals, [and] production losses"); *Kamuck v. Shell Energy Holdings GP, LLC*, 2012 WL 1463594, at *9 (M.D. Pa. Mar. 19, 2012) (negligence claims and duty for allegations that included release of fracking chemicals and contamination of private wells and surface and groundwater), *report and recommendation adopted in part, rejected in part*, 2012 WL 1466490 (M.D. Pa. Apr. 27, 2012); *Hartle v. FirstEnergy Generation Corp.*, 2014 WL 1117930, at *1 (W.D. Pa. Mar. 20, 2014) (negligence applied with allegations of adverse bodily injury), *on reconsideration in part*, 2014 WL 5089725 (W.D. Pa. Oct. 9, 2014); *Butts v. Sw. Energy Prod. Co.*, 2014 WL 3953155, at *9 (M.D. Pa. Aug. 12, 2014) (negligence claim and duty where allegations involved contamination of private water wells and structural damage to a motor vehicle).

to *In re Paoli Rail Road Yard PCB Litigation*, for the proposition that "[i]t is well-established that 'a reduction in market value is recoverable even absent permanent physical damage to the plaintiffs' property.'" Opp. at 18 (quoting 35 F.3d at 796). Plaintiff overlooks the actual holding of the Third Circuit, which is fatal to her position:

> [A]t least where (1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land, plaintiffs can make out a claim for diminution of value of their property without showing permanent physical damage to the land.

35 F.3d at 798 (emphases added). *In re Paoli* thus makes clear that "lost property value" is cognizable only where it is intrinsic to a claim premised upon physical property damage. *See Dalton v. McCourt Elec., LLC*, 2013 WL 1124397, at *1 (E.D. Pa. Mar. 19, 2013) (discussing damages for lost property value, in addition to inconvenience and discomfort, after negligent electrical work caused a house fire). Indeed, this Court recognized the principle that *In re Paoli* announced in its *Vizant Technologies* decision. *See Vizant Techs.*, 2016 WL 97923, at *16 (discussing generally Pennsylvania's law barring negligence claims arising solely from economic damages). Plaintiff has not alleged cognizable damage.[2]

[2] Recognizing that *Gilbert* and *In re Paoli* are dispositive, Plaintiff urges this Court to change Pennsylvania law and craft a duty to prevent all offsite odors. *See Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000) (enumerating factors for identification of previously unrecognized duties). Plaintiff argues that the social utility of waste-to-energy facilities and the public interest in their operations are far outweighed by the benefit of implementing a legal duty that all industry in the Commonwealth prevent any conceivable offsite odor. *See* Opp. at 14. To the contrary, the General Assembly decided that it is the people's intention to "encourage the development of resource recovery as a means of managing solid waste." 35 P.S. § 6018.102; *see also* 73 P.S. § 1648.2 (defining waste-to-energy as renewable energy for the purpose of entitling relevant generators to alternative energy tax credits in Pennsylvania). The only case Plaintiff invokes – *Markwest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd.* – involves public policy surrounding ground and surface water contamination. The Court should not impose this new onerous duty and should follow Pennsylvania law that there is no such duty.

Importantly, Plaintiff has not contested Covanta Plymouth's argument that her conclusory allegations of "physical property damage" fail to support a negligence claim. She only argues that she did not need to allege physical harm. Accordingly, Plaintiff concedes she has not alleged cognizable physical damage, and her negligence claim must be dismissed.

C. Plaintiff fails to overcome *Gilbert* and *Horne*'s holdings that nuisance facts do not support a negligence claim.

Plaintiff's negligence claim is also susceptible to dismissal because a negligence claim cannot be based on the "exact same facts" as a nuisance claim. *Horne v. Haladay*, 728 A.2d 954, 955-60 (Pa. Super. 1999); *Gilbert*, 90 A.3d at 51. Plaintiff asserts that her negligence claim "include[s] allegations of Defendant's acts and conduct that are beyond what is necessary to prevail on Plaintiff's nuisance claims." Opp at 16. Yet the question is not whether the legal elements of these claims overlap, but instead whether the factual foundations are the same. "[A] negligence claim cannot be based solely on the *facts* that establish a nuisance claim." *Horne*, 728 A.2d at 960 (emphasis added); *see also Gilbert*, 90 A.3d at 51.[3] This plainly stated principle is neither nuanced nor ambiguous.

Plaintiff's complaint here does just that, relying on the same basic allegations for all three causes of action: Covanta Plymouth has allegedly created odors that are purportedly causing nuisance to Plaintiff. Plaintiff's contention that a nuisance claim can be pled as nuisance *per se*

[3] Again, *Baptiste* did not decide any of the issues presented here when it remanded the decision on negligence. Plaintiff invokes dicta from *Baptiste* to argue that there was "no allegation of wrongful conduct (i.e. breach of a legal duty) . . . at issue in *Gilbert* or *Horne*." Opp. at 15-16 (quoting *Baptiste*, 965 F.3d at 228, n.10). This misstates the true allegations in *Gilbert* and *Horne*, wherein plaintiffs *did* actually raise allegations of wrongful conduct. *See Gilbert*, 90 A.3d at 41 (alleging defendant "acted negligently because the Farm Parties failed in their duty to properly handle and dispose of the biosolids in a manner to avoid the potential harm to the Residents"); *Horne*, 728 A.2d at 955 (discussing a "failure to take reasonable steps" to control odors).

has no bearing on the Court's analysis of Plaintiff's deficient negligence claim. Instead, the Court's analysis must consider whether the operative facts supporting the negligence claim are the same as those that would support a nuisance claim, thus determining the cause of action by its content, not its label. Where a claim sounds in nuisance, it does not become a negligence claim merely because a plaintiff wishes to frame it that way and alleges violations of state rules and permits, which will be found in almost all nuisance cases. Negligence damages are actual, physical injuries to person or property, whereas nuisance damages are "annoyance, inconvenience, discomfort or hurt" that are sufficiently material to require a presumption of damage. *Kramer v. Pittsburgh Coal Co.*, 19 A.2d 362, 363 (Pa. 1941). Negligence claims require physical injury, and can thus only coexist with nuisance claims where there are cognizable, additional allegations of physical damage. Accordingly, because Plaintiff's factual allegations are not meaningfully distinct between nuisance and negligence, her negligence claim fails.[4]

II. Plaintiff's Cursory Defense of Punitive Damages Dictates Dismissal

In demanding punitive damages, Ms. Lloyd seeks a rare and extreme remedy under Pennsylvania law, but offers no factual allegations to support the demand. *See, e.g.*, *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005) (punitive damages are "available in only the

[4] Covanta Plymouth must also highlight Plaintiff's admission that "[t]he allegations in the pleadings in *Baptiste* are materially indistinguishable from the allegations here." Opp. at 16. How could putative class allegations against operations at a waste-to-energy facility and at a landfill, sited in different counties, subject to different permit conditions, weather patterns, demographics, and geography, be materially indistinguishable? Is any person who happens to be located within a circle drawn on a map around any facility that exhibits air emissions, or holds a Title V permit, now a potential putative class member? The lack of any exacting pre-complaint analysis on Plaintiff's behalf calls into question her ability to represent the putative class, and highlights why there can be no boundless duty. She has apparently brought a federal class action lawsuit against Covanta Plymouth by reference to allegations made in a completely different lawsuit, based upon someone else's allegations. Covanta Plymouth will eventually oppose certification of any class as to any of her claims, and is obligated to do so on this basis alone.

most exceptional matters"). Plaintiff cites one case and argues that, as a matter of Pennsylvania procedure, occasions exist where striking a demand for punitive damages at the pleadings stage is inappropriate. *See* Opp. at 21. Plaintiff is incorrect under Pennsylvania law and the exacting standards for federal pleadings set forth by *Twombly* and *Iqbal* that govern this motion.

Pennsylvania's substantive law governing punitive damages is clear – an award of punitive damages is appropriate only when a plaintiff demonstrates that "defendant has acted in an outrageous fashion due to either the defendant's evil motive or his reckless indifference to the rights of others." *Id.* (internal quotations omitted). Plaintiff here does not – and cannot – allege the level of egregious conduct required to plead punitive damages. *See Maroz v. Arcelormittal Monessen LLC*, 2015 WL 6070172, at *7 (W.D. Pa. Oct. 15, 2015) (finding allegations of frequent complaints from neighbors, capacity for production, and knowledge of odorous impacts insufficient to overcome motion to dismiss claim for punitive damages relief); *Russell v. Chesapeake Appalachia, L.L.C.*, 2014 WL 6634892, at *2 (M.D. Pa. Nov. 21, 2014) (dismissing punitive damages claim for failure to plead facts that "meet the high standard for 'evil motive' or 'reckless indifference' necessary to impose punitive damages in Pennsylvania") (internal citation omitted); *see also Karpiak v. Russo*, 676 A.2d 270, 275 (Pa. Super. 1996) ("[C]onduct in engaging in a legitimate business can hardly be viewed as evil, outrageous, or indifferent," and does not support a claim for punitive damages).[5]

[5] Further, Plaintiff cannot cite even one case where the court has awarded punitive damages for the alleged release of odors that caused no physical damage. Her argument relies on a single out-of-context quote – from a case where a motorcyclist died – to request the Court delay its dismissal of her punitive damages demand. *See Artman v. Kochka*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 268 (Pa. County Ct. 2012). Yet, in *Artman*, the plaintiff alleged that defendant knowingly sent out a defective tow truck that leaked oil, ineffectively cleaned up the oil, and then left the mess to kill a motorcyclist. The court delayed dismissal (again, under Pennsylvania procedural law) because defendant was alleged to know about a consequent risk of death.

This litigation concerns the operation of a waste-to-energy facility pursuant to express PADEP authorization and oversight, not reckless or egregious conduct that warrants punishment. Plaintiff cannot premise her alleged entitlement to punitive damages on the lawfully permitted and regulated operations of Covanta Plymouth. *See id.* Plaintiff's conclusory allegations do not approach the level required to sustain a demand for punitive damages, and her scant opposition concedes as much; the Court should dismiss and strike it.

III. Plaintiff Confuses Preemption with Primary Jurisdiction, Thereby Conceding its Application

Ms. Lloyd never addresses and fails to rebut the fact that PADEP and the Pennsylvania Environmental Hearing Board ("EHB") have the authority, experience, and expertise regarding waste-to-energy facilities necessary to direct remedial measures consistent with applicable law, when necessary. Rather than meet Covanta Plymouth's primary jurisdiction argument, Plaintiffs attack an argument – conflict preemption – that Covanta Plymouth neither asserted nor mentioned. Covanta Plymouth argues that Plaintiff's requested relief is essentially an order requiring Covanta Plymouth to comply with its permit – a function already provided by the Commonwealth. Plaintiff herself invokes occasions of PADEP enforcement following isolated malfunctions at the Facility, *see* Opp. at 21, reflecting the exclusive regulatory hierarchy the Commonwealth envisioned when adopting the statutory and administrative procedures for permitting the Facility. Any court-ordered injunctive relief could undercut the primary jurisdiction of PADEP and EHB to regulate the Facility. In that respect, this Court should not be

---

Plaintiff here has not made any remotely, similar allegation of outrageous conduct warranting delay.

placed in the untenable position of exercising its equitable powers to oversee and second-guess an expert state agency charged with enforcing the very relief sought by Plaintiff.[6]

Again, Plaintiff has opposed the wrong motion. She references the savings clause in Pennsylvania's Solid Waste Management Act ("SWMA"), and preemption analyses tied to the Clean Air Act, to assert that her common law claims have not been "supersede[d]." Opp. at 21-22. This assertion, however, is irrelevant – primary jurisdiction and preemption are separate and distinct doctrines. Covanta Plymouth merely argues that Plaintiff's claim for injunctive relief should not proceed because the Court should defer to PADEP to determine whether injunctive relief is appropriate and, if ever appropriate, what form it should take. Primary jurisdiction does not supersede Plaintiff's viable common law claims or ability to obtain injunctive relief; it limits relief that would supplant regulatory agencies' jurisdiction and expertise, particularly where (as here) Plaintiff has not demonstrated that she has inadequate administrative recourse.

While Plaintiff's preemption argument is unresponsive, it is incorrect because the savings clause in the SWMA does not preclude conflict preemption, much less the operation of primary jurisdiction. The U.S. Supreme Court has repeatedly held that a savings clause in a statute allowing tort claims or local laws despite the regulatory scheme does not allow claims that conflict with the regulatory scheme. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341,

[6] Primary jurisdiction is "a prudential doctrine under which courts may . . . determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002); *see also Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371, 376 (Pa. 1980) (with primary jurisdiction courts "mak[e] use of the agency's special experience and expertise in complex areas" and "promote consistency and uniformity"). In contrast, conflict preemption precludes state law claims where "compliance with state and federal law is an impossibility" or "when state law stands as an obstacle" to accomplishing the full objectives of Congress." *Dooner v. DiDonato*, 971 A.2d 1187, 1194 (Pa. 2009).

352 (2001) ("[N]either an express pre-emption provision nor a saving clause bar[s] the ordinary working of conflict pre-emption principles" (citation omitted)). Here, placing the Court in the role of deciding injunctive relief would obviously conflict with PADEP's expert decisions.[7]

In controversies concerning regulated industries, courts should defer demands for injunctive relief to the agency with primary jurisdiction, in the interest of the "protection of the integrity of the regulatory scheme." *Cty. of Erie v. Verizon N., Inc.*, 879 A.2d 357, 363 (Pa. Commw. 2005). The primary jurisdiction doctrine is germane here because it "promote[s] consistency and uniformity in the area of administrative policy." *Id.* (internal quotations omitted). Waste-to-energy facilities are highly regulated and need consistent and uniform policies, subject to the specialized oversight of PADEP and EHB. Plaintiff offers nothing to contest the applicability of this doctrine here, and the Court should abstain by dismissing and striking Plaintiffs' demand for injunctive relief.

IV. Plaintiff Should be Denied Leave to Amend

Plaintiff should not be allowed "amend and cure," because any amendment would be futile. Amendment is futile where plaintiffs fail to explain how amendment would cure the defects in their claims. *See Murphy v. Office of Disciplinary Counsel*, 820 F. App'x 89, 93 (3d Cir. 2020). Here, Plaintiff has proffered no explanation for failing to allege cognizable physical damage and chose not to describe the physical damage she would claim with an opportunity to amend. To date her argument has been that she does not need to allege physical damage, because she has none, and she can thus make no viable amendment. *See United States v. Union Corp.*,

[7] *See North Carolina ex rel. Cooper v. Tenn. Valley Authority*, 615 F.3d 291, 301 (4th Cir. 2010) (injunctive relief sought by nuisance plaintiffs conflicted with state authority over emission under Clean Air Act); *Wheelabrator Baltimore, L.P. v. Mayor and City Council of Baltimore*, 449 F.Supp.3d 549 (D. Md. 2020) (state and federal air pollution regulatory scheme preempt local government attempt to set emissions standards).

194 F.R.D. 223, 237 (E.D. Pa. 2000) ("In a case of legal insufficiency, even the pleading of additional facts, or the pleading of facts with greater particularity, would not enable the claim to survive a Rule 12(b)(6) motion, because the defect in the pleading is the absence of any legal basis for recovery on the claim."); *see also Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 335 (7th Cir. 2018). Plaintiff's punitive and injunctive demands are similarly insufficient; the Court should dismiss and strike with prejudice.

CONCLUSION

This is a nuisance case against a major solid waste facility serving suburban Philadelphia. Ms. Lloyd concedes that she seeks to expand negligence liability to impose a duty in tort on a critical part of the state's solid waste infrastructure for alleged intermittent odors. Yet Pennsylvania law squarely holds that transient offsite odors are a subject of nuisance law, not a duty enforceable in negligence. Negligence actions cannot be based solely on nuisance harms absent physical damages, a principle underscored by the Superior Court in recent years. This Court should decline Plaintiff's invitation to supplant PADEP by imposing complex injunctive relief over the air pollution and solid waste regulations governing a large industrial plant. Plaintiff's negligence claim and requests for punitive and injunctive relief should be dismissed and stricken under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(f).

Dated: November 30, 2020

Respectfully submitted:

BY: /s/ *Robert M. Donchez*

BY: /s/ *Collin Gannon*

FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR LLC
Robert M. Donchez ID No: 209505
Robert Freedberg, ID No: 7855
60 West Broad Street, Suite 102
Bethlehem, PA 18018
(610) 691-7900
rdonchez@floriolaw.com
rfreedberg@floriolaw.com

BEVERIDGE & DIAMOND, P.C.
Michael G. Murphy (*admitted pro hac vice*)477 Madison Avenue, 15th Floor
New York, New York 10022
(212) 702-5400
mmurphy@bdlaw.com

James B. Slaughter (*admitted pro hac vice*)
1350 I Street, N.W., Suite 700
Washington, DC 20005
(202) 789-6000
jslaughter@bdlaw.com

Collin Gannon (*admitted pro hac vice*)
201 North Charles Street, Ste 2210
Baltimore, MD 21201-4150
(410) 230-1300
cgannon@bdlaw.com

Attorneys for Defendant Covanta Plymouth Renewable Energy, LLC

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020 a true and correct copy of Defendant Covanta Plymouth Renewable Energy, LLC's Reply in Support of its Motion to Dismiss and Strike, was electronically filed via the Court's CM/ECF system, which will provide electronic notifications of such filing to all counsel of record.

Dated: November 30, 2020

Respectfully submitted,

BY: /s/ *Collin Gannon*

BEVERIDGE & DIAMOND, P.C.

Collin Gannon (*admitted pro hac vice*)
201 North Charles Street, Ste 2210
Baltimore, MD 21201-4150
(410) 230-1300
cgannon@bdlaw.com

Attorney for Defendant Covanta Plymouth Renewable Energy, LLC